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JUN 9 1958
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 984

MERWIN LIGHTERAGE CO., INC.,

Petitioner,

v.

VIRGIN ISLANDS CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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Statement

This case involves no principle which has not been decided by this Court. The decision of the Court of Appeals for the Third Circuit, which is sought to be reviewed, reversed a decree for petitioner, in admiralty, which was contrary to the evidence and well settled admiralty doctrine.

There is no conflict between the decision of the Court of Appeals and the decision of any Court referred to in petitioner's brief, and, so far as we are aware, that of any other appellate Federal court.

Petitioner's statement of the facts in relation to the character of the sea and weather and the circum-

stances attending petitioner's failure to lash respondent's cargo on the barge "B-2" is inadequate and some further statement of the facts seems necessary to a right understanding of the case.

The S.S. "Alcoa Puritan" anchored off Frederiksted on the evening of August 25, 1952. Petitioner sent four lighters and its stevedore personnel out to the ship. The lighterage operations continued through the night without incident. About 10 o'clock the following morning, the weather shifted with rain squalls and increasing seas (transcript, pp. 42, 48, 56). By noon, the increasing sea conditions made it impossible to bring any more lighters to the dock (trans., pp. 46, 48, 57).

After the lunch hour, petitioner's dock foreman sent out instructions to petitioner's foreman on the ship that he could not accept any more cargo from lighters (trans., p. 74). However, petitioner's foreman in charge of unloading the "Alcoa Puritan's" cargo continued to load lighters, with the knowledge that they would have to be moored in the open roadstead with their cargoes on deck (trans., p. 63). All cargo was unloaded from the "Alcoa Puritan" by 3:45 P. M. (trans., p. 89). The "B-2", which had received respondent's cargo, was the last lighter to be loaded (trans., p. 63). During the time the "B-2", was being unloaded alongside the "Alcoa Puritan", petitioner had five lightermen on her who proceeded to lash down the cargo. They discontinued that work to assist in removing the lighter from alongside the ship to prevent injury to the lighter through striking the ship's side (trans., pp. 22-23). When the launch towed the "B-2" away from the ship, four of the men got off, leaving only one man on board to attempt to lash

respondent's cargo (trans., p. 23). This lone lighterman remained on the "B-2" from 3:45 P. M., the time it had received its cargo (trans., p. 18), until 2:00 A. M. the next morning, by which time all of the cargo, except one crate, had slid off the deck of the pitching and rolling lighter into the sea (trans., p. 14). Another of petitioner's lighters known as "plywood", which was also moored in the roadstead, was loaded with respondent's cargo of the same character as that laden in the "B-2", with this important difference—the "plywood" cargo was lashed and the "B-2" cargo was not lashed.

The key fact of this case appears in the following excerpt from the opinion of the Court of Appeals:

> "the district court explicitly found that on this occasion the crates of machinery were placed and left on this deck without being lashed down. In contrast, the cargo on the 'plywood barge', which had been loaded just ahead of the 'B-2', was lashed down with ropes. Left at their moorings near the Frederiksted shore overnight these two loaded barges had contrasting experiences. The lashed cargo rode out the storm on the deck of the 'plywood barge.' The unsecured cargo was cast overboard from the 'B-2'. This unusual situation of the contrasting experiences of two lighters moored in the same roadstead during a storm compels the conclusion that this mishap was not an inevitable accident" (petitioner's appendix, pp. 33-34).

The official records of the United States Coast Guard and the testimony of the Coast Guard lighthouse attendant show that no unusual weather or seas were recorded, and certainly none of the character that the decisions refer to as constituting a

technical peril of the sea i.e., "irresistible force or overwhelming power" (*The Giulia*, 218 F. 744, 746 (C. A. 2)).

At about the time the "B-2" was loaded and taken away from alongside the ship (4:00 P. M.), there was a northwest wind of force 2 on the Beaufort Scale, between 4 and 7 miles per hour—a "light breeze" (app. to appellee's brief in Court of Appeals, p. 2a). The log entries of the ship from which the "B-2" received respondent's cargo show no unusual sea or weather conditions (app. to appellee's brief in the Court of Appeals, p. 3a).

The testimony of the Coast Guard lighthouse attendant is that at no time during that day were the swells over five feet with the highest wind force at 18 knots; that during the night, when the cargo was cast overboard, the swells measured 6½ feet, with a wind force of ten knots; and the following morning the swells were down to five feet (testimony, pp. 31-33).

In response to a question by the district court, this witness said that he did not consider seas between six and six and one-half feet rough weather in Frederiksted harbor (testimony, p. 34). He testified that a storm or unusual wind condition occurs when the wind force is from 53 to 63 miles an hour; that on August 26-27, the material time in this action, the highest wind force was eighteen miles an hour, which was a light or moderate breeze (testimony, pp. 35-36).

With respect to petitioner's failure to lash respondent's cargo, viewed in the light of the government's weather records and testimony of the official govern-

ment observer, it is readily apparent that under the existing sea and weather conditions there was nothing to prevent the petitioner from lashing the respondent's cargo on the "B-2", as was done on the other barge which did not lose its cargo. As to this feature of the case, the Court of Appeals said (pet. app., p. 35):

> "* * * weather observations taken from the log of the ship * * * were in evidence. * * * except for possible gusts or squalls of short duration, the winds are shown to have been gentle or slight during periods when the securing of the cargo could have been undertaken. * * * the failure again to undertake the securing of the cargo after the lighter was clear of the ship remains wholly unexplained, except for testimony that all of the respondent's employees except one left the lighter very soon after it was loaded. And this remaining lighterman testified that the lashing operation would have been too much for him alone. All of this gives a picture of neglect of an obvious and indicated precaution, not of natural forces making that precaution impracticable."

None of petitioner's witnesses testified that it would have been dangerous to have lashed, or tried to lash, the cargo on the "B-2". The pumpman who was the only person on the "B-2", did not testify that there was any danger in lashing the cargo; he testified only that it would have been dangerous to the barge alongside the ship, where waves caused it to surge against her side. The pumpman testified that although he tried, "I alone could not lash it down" (testimony, p. 7). The pumpman being the sole person on the "B-2", he was the only person in position to state whether the sea was too rough to secure the cargo, and

he testified that the barge was not rolling at that time (testimony, p. 10).

The Court of Appeals in ruling that petitioner did not exercise due care for the protection of respondent's property observed that its finding is based upon "undisputed facts" (pet. app., p. 33). In reaching that decision the Court of Appeals accepted the finding of the district court that the storm, during the course of which the cargo was cast overboard, was more severe than could reasonably have been foreseen (pet. app., p. 33).

While crediting the evidence accepted by the district court, the Court of Appeals ruled that the former, in finding that the petitioner was not negligent and that the storm was the direct cause of the loss of the cargo, had failed to evaluate the facts in the light of correct legal principles (pet. app., pp. 33, 34-35).

The argument of petitioner appears to be that the district court's findings are not clearly erroneous and, therefore, the Court of Appeals erred in ruling that respondent's loss was proximately caused by petitioner's negligence (pet. app., p. 35).

The Issues

As appears from the foregoing Statement, the petition presents three issues, two of which are factual: (a) whether a technical "peril of the sea" existed, and (b) whether, in view of prevailing sea and weather conditions, it was practical for petitioner to have lashed the cargo on the "B-2". The remaining issue

is one of law dealing with a question of burden of proof, in respect of which the district court made a finding contrary to the ruling in *Schnell* v. *The Vallescura,* 293 U. S. 296, 305, and other decisions of this Court. The Court of Appeals, in reversing, resolved all of the aforementioned issues against the petitioner.

No question of law is presented upon which the Courts have disagreed. The two issues of fact do not concern any elements of important public interest and, moreover, they relate to questions to which established principles of law were applied by the Court of Appeals. The Court of Appeals reversed the district court because it had erred in the application of accepted principles.

Two dispositive conclusions were formulated by the Court of Appeals, viz. (pet. app., pp. 33, 35):

> "In our view the undisputed facts, evaluated in the light of correct legal principles, compel a finding that the respondent did not exercise due care for the protection of libellant's property" (pet. app., p. 33).
>
> * * * *
>
> "On the entire record we cannot avoid conclusion that respondent's fault, as well as the stormy weather, played a substantial part in this unfortunate mishap. The district court should have so found and, therefore, should have held the respondent legally liable for the cargo loss" (pet. app., p. 35).

We shall consider petitioner's "Questions Presented for Review", in the order in which they appear in the petition.

Question 1

The contention here advanced is that the Court of Appeals erred when it found petitioner guilty of negligence.

Petitioner's negligence was established in the following particulars:

(a) Because the character of the storm was not such as to establish that a technical "peril of the sea" existed.

(b) Because the sole lighterman on the "B-2" testified that it was not the condition of the sea that prevented the cargo from being lashed down; that on the contrary it was due to the fact that the other four lightermen had abandoned the barge and he could not perform the job alone.

(c) Assuming that the sea and weather conditions were such as to fall within the technical classification of "peril of the sea," that defense is not available to a carrier where there is concurrent negligence on its part.

As to sub-division (a) above:

The Court of Appeals ruling that "unusually severe weather * * * is not enough to establish the defense of 'inevitable accident' resulting from a 'peril of the sea'" and that

> "it must also be shown that weather conditions were more than a staunch and adequately equipped vessel, with its cargo properly secured, could have withstood" (pet. app., p. 33),

is in accord with long established authority.

In *The Giulia*, 218 F. 744 (C. A. 2), the Court said (p. 746):

> "Perils of the seas are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence."

To the same effect:

> *The Rosalia*, 264 F. 285, 288 (C. A. 2);
> *Waterman S.S. Corp.* v. *United States S. B. & M. Co.*, 155 F. (2d) 687, 692 (C. A. 5); cert. den. 329 U. S. 761;
> *The Edith*, 10 F. 2d 684, 686 (C. A. 2).

The English Courts have characterized a "peril of the sea" as

> "* * * something which could not be forseen as one of the necessary incidents of the adventure".
> (*Thomas Wilson, Sons & Co.* v. *The Xantho*, 12 App. Cas. 503, 509).

The Court of Appeals below applied the foregoing rule in the following language (pet. app., p. 34):

> "This court has had occasion more than once to reverse a finding of inevitable accident when the record has showed that the weather, though bad, was less than catastrophic and that some reasonable precaution could have been taken to protect vessel or cargo against its impact."

As appears from the testimony of the only lighterman on the "B-2", referred to in the Statement to this brief, no such circumstance was present in this case and, measured by the criteria quoted above, the

district court's finding that the loss of respondent's cargo is attributable to inevitable accident or peril of the sea (pet. app., p. 33), is clearly erroneous. It was so held by the Appellate Court (pet. app., p. 35).

It frequently has been held that it is inexcusable negligence for a carrier properly to secure deck cargo and, where cargo is lost in storms at sea because of inadequate lashing, its liability is thereby established.

> *Waterman S. S. Corp.* v. *United States S. R. & M. Co., supra*;
> *U. S. Industrial Alcohol Co.* v. *Calmar S.S. Corp.*, 53 F. 2d 1023, 1024 (S. D. N. Y.); reversed on other grounds, 57 F. 2d 182;
> *The Carlos*, 237 F. 731, 733 (N. D. Cal.).

Under its Point VII E, petitioner argues that the Court of Appeals' finding that the contrasting experience of the two lighters (the lashed cargo of the plywood barge rode out the storm while the unsecured cargo of the "B-2" was cast overboard), is not material upon the issue of petitioner's negligence. In support of its argument, petitioner advances the contention (brief, p. 20) that the plywood barge, being the larger of the two, was able to ride the waves whereas the "B-2" cast her deck load because "the barge was too short to ride those waves" (brief, p. 16).

This admission establishes the unseaworthiness of barge "B-2", as well as the negligence of petitioner in the use of the barge, for petitioner's operating

manager admitted that the "B-2" was unseaworthy to carry respondent's cargo in a rough sea (testimony, p. 97); and that it was supposed to be used only under normal conditions when the cargo could be brought to shore (testimony, p. 29). Petitioner is thus shown to have been negligent in using a lighter that was not designed to ride out rough weather in the open roadstead with cargo on deck. Despite the foregoing undisputed testimony, the district court found that there was no evidence that the "B-2" was unseaworthy (pet. app., p. 26). We submit that the district court's failure to find that the "B-2" was unseaworthy for the carriage of deck cargo under the conditions which prevailed during the transfer of respondent's cargo from ship to shore, is clearly erroneous because it is in direct conflict with the undisputed testimony of petitioner's operating manager in the particulars specified above. The standard of seaworthiness for a barge was prescribed by this Court in *The Northern Belle*, 9 Wall. 526, at 530:

> "It is the duty of the carrier to see that his barge is capable of resisting these forces (of wind and wave) without subjecting the cargo to injury. She must be * * * so strong that these ordinary applications of external force will not spring a leak or sink her, so sound that she will safely carry the cargo in bulk through these ordinary shocks to which she must every day be subjected."

Under its Point VII D (brief, p. 19), petitioner argues that its failure to lash down the cargo on barge "B-2" was an act done in the "navigation" of the barge and not an act of negligence in breach of its duty as bailee to care for respondent's cargo. The authority cited by petitioner in support of its contention is *Commercial Corp.* v. *N. Y. Barge Corp.*, 314 U. S. 104.

The petitioner has misapprehended the ruling of this Court in that case. Petitioner asserts that the sinking of the barge in the *Commercial Corp.* case, *supra,* was due to the act of the bargee in turning a wrong valve which overloaded its tanks and that this Court held the same

> "to constitute an error in navigation and thus was not negligence."

The ruling in question is found in the following excerpt from the opinion of this Court (314 U. S., at p. 106):

> "If, as alleged, over-filling of the stern tanks caused the loss without the privity or knowledge of respondent, it could limit liability. R.S. 4283, 46 U. S. C., Sec. 183."

Sec. 183 of 46 U. S. C., upon which petitioner's contention is predicated, is, or course, the statute which provides for the limitation of liability of a shipowner for the loss of goods shipped on his vessel, occasioned without the privity or knowledge of such owner, to the value of his interest in the vessel and her pending freight.

Section 183 contains no provision for exoneration of a shipowner due to an error in navigation. That relief is accorded a vessel owner under Sec. 192 of 46 U. S. C. (Sec. 3 of The Harter Act), which provides that if a vessel owner shall exercise due diligence to make his vessel in all respects seaworthy, properly manned, equipped, or supplied, her owner shall not become responsible for damage

> "resulting from faults or errors in navigation or in the management of said vessel."

It is clear, therefore, that petitioner has misinterpreted the two statutes. Moreover, the benefits of Section 192 do not apply to a private carrier (as was the petitioner herein), except in case of special agreement. No such special agreement existed.

> *Koppers Connecticut Coke Co.* v. *James McWilliams Blue Line,* 89 F. 2d 865; (C. A. 2) cert. den. 302 U. S. 706;
> *Norris Grain Co.* v. *Empire Canal Corp.,* 42 F. 2d 482 (reversed on other grounds 52 F. 2d 41) (C. A. 2);
> *The Raleigh,* 50 F. Supp. 961 (D. Md.).

Finally, in *The Germanic,* 196 U. S. 589, 597-598, this Court held that "where the primary purpose is to get the cargo ashore" a carrier, otherwise entitled thereto, may not invoke the "navigation and management" provisions of the third section of the Harter Act.

As to sub-division (b) above in which petitioner contends that it was unable, because of the prevailing conditions, to lash the cargo on the "B-2", the Court of Appeals found that

> "there was affirmative indication that it would have been feasible to secure this deck cargo" (pet. app., pp. 34-35).

It is conceded that the cargo on the "plywood" barge, which was loaded and *lashed down* only a short time before the "B-2" completed loading, lost none of its cargo (pet. brief, p. 4; testimony, p. 7).

The evidence concerning the absence of any extraordinary sea or weather conditions during the period

the cargo could have been lashed on the "B-2" and that the reason for not lashing the same was lack of manpower, is discussed in the Statement to this brief.

The Court of Appeals found that petitioner's

> "failure again to undertake the securing of the cargo after the lighter was clear of the ship remains wholly unexplained, except for testimony that all of respondent's employees except one left the lighter very soon after it was loaded" (pet. app., p. 35).

As to the winds which prevailed at the time the barges were towed away from the ship, the Court of Appeals found that they were

> "gentle or slight during periods when the securing of the cargo could have been undertaken" (pet. app., p. 35).

The aforementioned facts, said by the Court of Appeals to be "undisputed" (pet. app., p. 33), establish the finding of the district court that

> "there is no evidence to show that the sea was not too rough (for lashing down the cargo on the B-2), or the operation not too hazardous" (pet. app., p. 28),

to be clearly erroneous, as was held by the Court of Appeals (pet. app., pp. 34-35).

However, if it be assumed that the trial judge was correct in ruling that the record contains no such evidence, that circumstance would not avail the petitioner because it failed to discharge its burden of proof of making an exculpatory showing. This long

established rule of law was referred to by the Court of Appeals in the following language:

> "There is another legal rule, applicable to the loss of goods at sea by a private carrier, which is significant for the evaluation of the evidence in this case, although the trial court did not allude to it. Although a libellant who claims damages for the loss of his property during bailment has the burden of proof as to negligence, the very fact that a private carrier has lost the goods entrusted to it creates such an inference of fault that the carrier must come forward with some exculpatory showing. Schnell v. The Vallescura, 1934, 293 U. S. 296, 305; The S. C. L. No. 9, 3d Cir. 1940, 114 F. 2d 964, 968; Aetna Ins. Co. v. Florida Towing Corp., S. D. Fla. 1941, 37 F. Supp. 781.
>
> Here, far from being exculpatory, the evidence reinforces the presumption of fault on the part of the bailee" (pet. app., p. 34).

As appears in the excerpt quoted above, the rule was applied by this Court in *Schnell* v. *The Vallescura*, *supra*, at pp. 304-305, as well as in *Commercial Corp.* v. *New York Barge Corp.*, 314 U. S. 104, 111; *The Edwin I. Morrison*, 153 U. S. 199, 212; *The Northern Belle*, 9 Wall. 526, 529, and other cases. As was said in *Commercial Corp.* v. *New York Barge Corp.*, *supra* (p. 111):

> "Since the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was one not involving the bailee's liability, the law lays on him the duty to come forward with the information available to him."

As to sub-division (c) above: The rule has been long established that a carrier may not secure exonera-

tion under the defense of "peril of the sea" where its negligence contributed to the loss. *Clark* v. *Barnwell*, 12 How. 272; *The Edwin I. Morrison*, 153 U. S. 199.

Wholly apart from the question of whether a technical "peril of the sea" existed, petitioner's negligence in furnishing barge "B-2", which was concededly too short and unsuitable to carry deck cargo in a storm, together with its additional negligence in loading the barge after it was aware that it would have to ride out stormy weather with cargo on its deck, and in failing to lash down the cargo thereon, were concurring faults. Therefore, it appears that the district court, additionally, was clearly in error in failing to apply to the circumstances of this case the rule of law stated by this Court in *Schnell* v. *The Vallescura*, *supra*, and the other cases hereinabove cited.

In *Clark* v. *Barnwell*, *supra*, this Court said (p. 280):

> "Hence it is, that, although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable."

In *The Edwin I. Morrison*, *supra*, this Court said (p. 211):

> "Perils of the sea were excepted by the charter party, but the burden of proof was on the respondents to show that the vessel was in good condition and suitable for the voyage at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants, contributed."

Question 2

The petitioner here urges that the findings of the trial court are not clearly erroneous and, accordingly, the Court of Appeals should not have reversed.

In *McAllister* v. *United States*, 348 U. S. 19, this Court said (p. 20):

> "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'"

The evidence showing that the sea and weather conditions were not unusual and did not prevent the cargo from being secured but that such failure was due solely to the fact that the care of the "B-2" was abandoned to one lighterman who was unable, alone, to lash the cargo, is reviewed in the Statement to this brief.

We, of course, are in accord with petitioner's argument, under its Question 2, that if the district court's findings are not clearly erroneous, the Court of Appeals did not have the power to reverse. We submit that the trial judge's findings in the respects hereinabove referred to, are clearly erroneous, relating, as they do, to key facts and fundamental rules of law. We submit further that the Court of Appeals' reversal accords complete recognition to the qualification stated by this Court in *United States* v. *Gypsum Co.*, 333 U. S. 364, 395:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court

> on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

That the Court of Appeals had such conviction is shown by the following excerpt from the opinion (pet. app., p. 35):

> *"On the entire record we cannot avoid conclusion* that respondent's fault, as well as the stormy weather, played a substantial part in this unfortunate mishap. The district court should have so found and, therefore, should have held the respondent legally liable for the cargo loss" (pet. app. 35). (Emphasis supplied.)

Question 3

As petitioner under this question engages in erroneous assumptions, both of law and fact, we think its argument requires no more than cursory attention. Petitioner erroneously assumes:

(a) its failure to lash down the cargo on barge "B-2" was not negligence;

(b) that the storm was of such character as to constitute a "peril of the sea."

In addition to the foregoing, petitioner fails to accord recognition to the rules of law announced by this Court in

(a) *Clark* v. *Barnwell, supra*, as to the availability of the defense of "peril of the sea" where a carrier's negligence contributes to the loss;

(b) *Schnell* v. *The Vallescura, supra*, as to a carrier's burden to come forward with some exculpatory showing; and

(c) *The Northern Belle, supra*, as to the duty of a carrier to provide a barge conforming to the standard of seaworthiness prescribed therein.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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